LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 16 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

Case No. 623

VIVIAN CALHOUN, et al.,

Petitioners,

vs.

A. C. LATIMER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

INDEX

Page

Question Presented 1

Statement 2

Reasons Relied on for Allowance of Writ Discussed 12

(1) The Plan Is Proceeding With All Deliberate Speed 12

(2) The Plan Will Achieve Total Desegregation 19

(3) The Courts Below Postponed the Question of Assignment of Teachers and Staff. This Was a Proper Exercise of Discretion 20

There Is No Need for This Court to Grant Petition for Writ of Certiorari 23

Conclusion 26

Appendix 27

TABLE OF CASES

Aaron v. *Cooper*, 243 F. 2d 361 (1957) 16

Augustus v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (C.A. 5th, 1962) 19, 22

Bosun v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960) 18, 25

Brown v. *Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) 21, 23

Brown v. *Board of Education of Topeka*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) 22

TABLE OF CASES

Page

Bush v. *Orleans Parish School Board*, 308 F. 2d 491 (C.A. 5th, 1962) 19

Cooper v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958) 2, 14, 23

Davis v. *Board of School Commissioners of Mobile County, Alabama*, 84 S. Ct. 10 (1963) 24

Davis v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (C.A. 5th, 1963) 18, 24, 25

Evans v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960) 17

Goss v. *Board of Education of City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963) 7, 11, 18, 24

Evans v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960) 17

Goss v. *Board of Education of City of Knoxville*, 301 F. 2d 164 (C.A. 6th, 1962) 24

Jackson v. *School Board of City of Lynchburg, Virginia*, 321 F. 2d 230 (C.A. 4th, 1963) 18

James v. *Almond*, 170 F. Supp. 331 (E.D. Va., 1959) 4

Kelley v *Board of Education of City of Nashville*, 270 F. 2d 209 (C.A. 6th, 1959) 16, 24

Potts v. *Flax*, 313 F. 2d 284 (C.A. 5th, 1963) 21

Shuttlesworth v. *Birmingham Board of Education*, 358 U.S. 101, 3 L. Ed. 2d 145, 79 S. Ct. 221 (1958) 2, 23

Stell v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425, (C.A. 5th, 1963) 19

Stone v. *Members of the Board of Education City of Atlanta*, 309 F. 2d 638 (C.A. 5th, 1962) 7

Watson v. *Board of Education of City of Memphis*, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963) 10, 15

IN THE

Supreme Court of the United States

Case No......

VIVIAN CALHOUN, et al.,

Petitioners,

vs.

A. C. LATIMER, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTION PRESENTED

The United States District Court for the Northern District of Georgia, Atlanta Division, held that the respondents were proceeding in good faith to effect desegregation of the public school system of Atlanta, as required by the United States Constitution, and in conformity with the mandate of the second *Brown* case. The United States Court of Appeals for the Fifth Circuit affirmed "within the context of what we have had to say regarding the plan." Is there need for this Court to review or displace the discretion of those courts, or to dis-

turb the orderly transition to desegregated education in Atlanta?

STATEMENT

This suit commenced on January 11, 1958. An injunction was issued by the District Court forbidding the defendant school board to continue their former policy of enforcing segregation in the public schools under their control. By way of implementing its decree, the Court also ordered the defendants to submit a desegregation plan for the school system of the City of Atlanta, and this was done on November 30, 1959.

The plan submitted was a pupil placement plan modelled after the plan approved by this Court in *Shuttlesworth* v. *Birmingham Board of Education*, 358 U.S. 101, 3 L. Ed. 2d 145, 79 S. Ct. 221 (1958). Its main features were as follows: (1) The plan provided for desegregation of one grade a year. (2) It contemplated initial reassignment of all pupils to the schools they were then attending, with transfers or other future assignments to be governed by the eighteen criteria set out in the plan. (3) It made no provision respecting the hiring or assignment of faculty or supervisory personnel or staff.

A number of objections were made to the plan, or rather to various provisions of it, including to its main features (1) and (2) above. (R. 29; 377; 391). A hearing was held on the objections to the plan. One of the eighteen criteria was ordered excised from the plan, based upon *Cooper* v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958). Some of the criteria were susceptible of more than one interpretation and application, and the Court's order specified that such criteria could not be applied in a racially discriminatory way.

The District Court required a modification of the plan so as to show that all administrative remedies under the plan could be exhausted by not later than September 1 of any year, thus meeting an objection of the Plaintiffs that the administrative provisions of the plan could be used for delay.

Some of the objections of the Plaintiffs were denied. The objection that the plan reassigned all school children to the schools which they were attending at the time was denied. In the hearing on the objections to the plan, on December 14, 1959, there occurred the following colloquy between the Court and counsel for the Plaintiffs:

> "THE COURT: Let me ask you this: The plan as submitted by the Atlanta School Board says in effect that all the pupils I assume are in the classes and in the schools that they are now in but it makes provision for the application of any person to go from one to another. You seem to think that is not a plan and when you say complete integration or complete abolition of segregation, just what do you mean? Do you mean taking all of the schools and eliminating every student from every school in which they are now in? Specifically how would you recommend going about it?
>
> "MRS. MOTLEY: Well, I don't mean moving every student in every school; what I refer to in addition to assignment of pupils is the designation of certain schools as Negro and white." (R. 31 et seq.)

The order of the Court dated December 30, 1959 stated:

> "Essentially the plan contemplates that all pupils in the school shall until and unless transferred to some other school, remain where they are . . . ." (R. 29).

The plan was ordered put into effect on May 1, 1960, contingent upon the enactment by the General Assembly of Georgia of legislation permitting it. The reason for this was recognition by Judge Hooper that under Georgia laws on the books at the time any integration in the Atlanta school system would result in termination of State financial support to such system. This in turn would have resulted in the closing of all Atlanta public schools, which latter effect might cause the closing of all Georgia schools under the doctrine of the Fourth Circuit case of *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va., 1959).

The Georgia General Assembly convened and adjourned without enacting the legislation upon which the plan had been made contingent. On February 26, 1960, the plaintiffs made a motion for further relief asking that the plan be ordered into effect anyway. That is to say, the plaintiffs, though presumably not wholly satisfied with the plan since many of their objectives had been overruled, nevertheless accepted the plan at that time and asked that it be put into effect. On March 9, 1960, the motion for further relief was denied.

An appeal was taken at that time. However, the plaintiffs decided to await the report of the Sibley Commission (a committee of prominent Georgians appointed by the Legislature to hold hearings throughout the State and take the sentiment of the people of Georgia as to whether they would prefer integrated schools or no schools at

all). Accordingly, the plaintiffs moved to dismiss their appeal. Plaintiffs were required by the District Court to amend their motion to dismiss the appeal and specify the order being appealed and the effect of the dismissal. (R. 32)

The amended motion to dismiss the appeal made it clear that appeal had been taken from the refusal to put the plan into effect in May 1960 rather than from the rulings of the District Court upon the various objections to the plan. Those rulings were acquiesced in by both sides, by the plaintiffs by their failure to appeal and by their motion to have the plan put into effect, and by the defendants by their failure to appeal and their amendments to the plan in compliance with the order of December 30, 1959.

The plan went into effect on May 1, 1961, after enabling legislation by the General Assembly of Georgia.

On April 30, 1962, the plaintiffs moved for further relief. Hearings were held on this motion on July 31, 1962, and again on October 30, 1962. The plaintiffs' motion was denied on November 15, 1962. In his order, the District Judge made clear his finding that the plan was being carried out in good faith according to its terms. He also indicated that he considered that, in most respects, the motion for further relief merely raised again questions concerning the validity of the plan as a whole. He thought that the plan could not be said, at that time, to have been given an adequate trial, since it had been in effect only two years at the time. Its final impact could not be assessed as yet. (R. 348, et seq.; R. 293).

Plaintiffs appealed to the Fifth Circuit, which affirmed. In the course of doing so, the Court made a number of

remarks about the plan which have had, and will have, significant effects upon the operation of the plan. We will make further references to this *infra*.

The Court will perhaps judicially notice that public figures active in Georgia politics took positions in defiance of the Supreme Court after the school segregation cases. This has never been true of the leadership of the City of Atlanta, nor of the respondents in this case. The Courts below have found that these respondents conscientiously and in good faith attempted to proceed with desegregation.

At the time when the District Court first had this case, and then when it was on the point of ordering desegregation of the Atlanta school system, there was very real fear in the City that public education would be lost. Citizen groups formed to save the schools, and they were successful. Since that time the prevailing attitude in the State has shifted greatly. Most, if not all, of the obstacles placed in the way of this Board of Education have now at last been swept away.

Still, the desegregation plan here contested has been in operation only since the fall of 1961. That is not the fault of the respondents. The District Court in the exercise of a wise restraint withheld his injunctive order until such time as the plan could be put into effect without destroying public education in Georgia. We believe the progress we have to report, and the actions of the respondents and the Court below, should be considered against that background.

The pupil placement plan went into effect for the school year that began in September, 1961, and it applied to the twelfth and eleventh grades (Atlanta having

adopted a top-down system similar to that of Little Rock, Arkansas, but unlike most cities). Under the plan, as we have seen, children were automatically assigned to the schools in which they already were, and they were free to apply for transfers. That year ten Negro children were assigned to formerly white schools. It was a small beginning, but it seemed momentous at the time. One white child who sought a transfer because Negroes were admitted to her school had her request denied because it was placed upon racial grounds and therefore did not meet the standards of the plan. See *Stone* v. *Members of the Board of Education City of Atlanta*, 309 F. 2d 638 (C.A. 5th, 1962), and cf. *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963).

In the second year of operation the plan was applicable to grades ten, eleven and twelve and 44 additional Negroes transferred to formerly all white schools. The figure for the current year is 144. For the year commencing September, 1964 we anticipate a much more substantial increase, for reasons that will appear *infra*.

In the Atlanta school system there are twenty-two high schools (not counting Faith School which has only the eighth grade, which is counted as high school under the Atlanta system of seven years grammar school, five years high school). Of these there is some measure of desegregation in ten. The partially desegregated schools have a total enrollment of 11,790 students, as against a total high school enrollment of 33,197.

The integration which has occurred has been total, in the sense that such extracurricular activities as honor societies, athletics, clubs, graduation activities, P.T.A.'s,

and the like, have been conducted on a non-racial basis in the desegregated schools. (See the opinion of Judge Bell in the Court below at P. 22a, Appendix to petition for certiorari.)

The desegregation plan originally included some eighteen criteria to be employed to determine whether requests for transfer should be granted. In spite of the fact that two courts have found that the plan was being fairly administered with the good faith purpose of achieving complete desegregation at the earliest practicable time, the respondents have gradually shrunk the requirements of the plan to make transfer under it easier and to remove even the ground for suspicion of abuse of discretion. Almost all of the criteria governing transfers have been dropped, most of them without the compulsion of a court decree. All of the ones that were susceptible of abusive use of discretion have been dropped.

The following criteria, having been determined to serve no useful educational purpose, have been dropped:

a) the effect of the admission of new pupils upon established or proposed academic programs;

b) the suitability of established curricula for particular pupils;

c) the adequacy of the pupil's academic preparation for admission to a particular school and curriculum;

d) the scholastic aptitude and relative intelligence or mental energy or ability of the pupil;

e) psychological qualification of the pupil for the type of teaching and associations involved;

f) the possibility or threat of friction or disorder among pupils or others;

g) the possibility of breaches of the peace or ill will, or economic retaliation within the community;

h) the effect of admission of the pupil upon the academic progress of other students in a particular school or facility thereof;

i) the effect of admission upon prevailing academic standards at a particular school;

j) the psychological effect upon the pupil of attendance at a particular school;

k) the home environment of the pupil;

l) the maintenance or severance of established social and psychological relationships with other pupils and with teachers;

m) the ability to accept or conform to new and different educational environment;

n) the morals, conduct, health and personal standards of the pupil.

The most important changes in the plan, however, are those that have taken place as a result of the opinion of Judge Bell, or are planned for September, 1964. These are not in the record, of course. We are dealing with a record made in the first days of desegregation, yet the Court is asked to assess the degree of progress toward a goal made over a period of time. We do not see how that can fairly be done unless we, as attorneys and spokesmen for the school board, may make reference to things

that have occurred after the making of the formal record. In this connection we would invite the Court's attention to the opinion in *Watson* v. *City of Memphis*, 373 U.S. 526, 10 L. Ed. 2d 529, 83 S. Ct. 1314 (1963), in the course of which reference is made to the fact that several city parks had been desegregated since the filing of the petition for certiorari. (Also, see n. 8 at 83 S. Ct. 1320.)

We believe the construction we place upon the opinion of Judge Bell goes the whole way toward satisfying the complaint that the petitioners appear to regard as their principal grievance, even though we do not think the Fifth Circuit has demanded the marking off of school zones as rings of iron around each school.

Upon the receipt of the opinion of the Court below, upon advice of counsel, the school authorities called in every child who had made a request for transfer during the period provided in the plan. If that child said that he still wanted the transfer granted it was granted, on one condition only, namely, that the school he wished to attend was closer to his home than the school he was then attending. (See, in the Appendix, the letter from a school official to one of the attorneys for the respondents.)

In the preceding paragraph there is a reference to requests for transfer "during the period provided in the plan." It is clear from the opinion of the Circuit Court that such a qualification is no longer permissible, and it has been abandoned.

For the school year beginning September, 1964 the desegregation plan will be effective for grades eight through twelve. As we interpret the opinion of the Court

below, every student in those grades in the City of Atlanta system, irrespective of race, shall be entitled, as a matter of right, to attend the school nearest his home. We think that acceptance of that principle can scarcely be said to be less than good faith implementation of the applicable constitutional principles.

We also think that, consistent with such principles, modifications may be made to take into account natural physical barriers as, for example, an expressway or railroad track between the child's home and the school. We believe that we may retain transfer provisions, without racial criteria, authorizing children to transfer to schools other than the closest ones, where such schools have sufficient capacity to accommodate the transferees and transportation is available. Cf. *Goss* v. *Board of Education of City of Knoxville,* 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963).

We would make a proviso for special cases such as that presented by East Atlanta High School and Murphy High School. Because of their proximity to each other and the relative sparseness of the population in the area, East Atlanta High would be under-utilized unless assignments may be made to it against the wishes of students who live closer to Murphy or to other schools.

That is the situation with regard to desegregation in the Atlanta schools at the present time, and the intentions of the school authorities for the school year beginning next September. We would still oppose the drawing of school zones by a Court or even the school authorities. Atlanta has never had a system of zones. Some years ago the City was served by one central high school for boys and one for girls. (We refer only to the

white schools. The system was segregated, of course.) When this scheme was abandoned and the City changed to a modified neighborhood school scheme there still were no zones. Whenever problems of crowding, or under-utilization, occurred, they were solved on an ad hoc basis by the school principals affected, or by the area superintendent. This was not an anti-integration scheme; segregation was not an issue then. That system has worked well and the school authorities consider that, educationally, it best serves Atlanta, and they are anxious to preserve it. Allowing every child to attend the school nearest his home we believe achieves total desegregation.

REASONS RELIED ON FOR ALLOWANCE OF WRIT DISCUSSED

The argument of petitioners under this heading may be conveniently subdivided into three parts. These parts relate respectively to the items we characterized at the beginning of this brief as the three main features of the Atlanta plan for desegregation. We will discuss each of them in turn.

1. The plan is proceeding with all deliberate speed.

This court recognized in *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), that accomplishment of desegregation would require solution of a large number of problems, and that this could not be done overnight. It was also recognized that courts were but ill equipped to accomplish this task and that primary responsibility for it should rest with the local school boards. The Court declared that the function of the courts would be to super-

vise the school authorities to ensure that they act in good faith to implement governing constitutional provisions. This was a carefully considered view. A year elapsed between the holding that segregated education is unconstitutional and the formulation by this Court of the implementation decree. We believe the reasons for the adoption of that approach are still valid. What the petitioners ask in this case is nothing less than the abandonment of the principles of the second *Brown* case and the adoption of the position that was rejected in that case.

Petitioners emphasize that eight years have passed since that case. Public officials in Georgia did not accept the propriety of *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), when it was first decided and they effectively prevented compliance by the Atlanta Board of Education to the brink of destruction of public education in Georgia. (R. 108) All that is past now. The plan has been in operation for a little over two years. It is an orderly plan calculated to produce the constitutionally required result.

The District Court held:

> "The Plan heretofore approved by this Court, and now under attack, has been administered fairly and in good faith by defendant Atlanta Board of Education, the local authorities have given utmost cooperation in maintaining law and order, and the number of students being transferred each year from previously designated colored schools to previously designated white schools is increasing at an accelerated rate each year as the lower grades are reached. This Court feels that the public interests

> demand that the Plan now in operation be continued according to its terms and not be summarily displaced by the new Plan of Desegration proposed by plaintiffs." (See page 6a, Appendix to pet. for cert.)

Other cities and other states have had a different experience. The very purpose and meaning of the holding in the second *Brown* case was that this would be so, and that all school districts could not move in lock step. For these reasons it is clear that there is no conflict between circuits, or within a circuit, merely from the fact that two school districts are allowed to move at different speeds, or to arrive at the ultimate goal at slightly different times. What is necessary is that the lower federal courts apply correct constitutional principles, and that local school boards act in good faith toward the end of achieving desegregated school systems. Neither of those requirements is missing here.

This Court reaffirmed this basic view in *Cooper* v. *Aaron*, 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958), where it was said:

> "Under such circumstances, the District Courts were directed to require 'a prompt and reasonable start toward full compliance,' and to take such action as was necessary to bring about the end of racial segregation in the public schools 'with all deliberate speed.' . . . Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the

> relevant factors (which, of course, excludes hostility to racial desegregation); might conclude that justification existed for not requiring the present non-segregated admission of all qualified Negro children. In such circumstances, however, the Courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. . . . " 358 U.S. at p. 7.

Those words were spoken in 1958, four years after the first *Brown* decision. It is clear that they still describe the law. In no case has this Court undertaken to take over the task of the school boards of formulating a desegregation plan, nor that of the lower federal courts of supervision. More particularly, this Court has never attempted to say precisely what speed was "all deliberate speed" for a particular community. If this Court were to decide in this case that a twelve-year plan was too slow for Atlanta, it would have to do so either by abandoning the decision of the second *Brown* case, as reaffirmed in *Cooper* v. *Aaron*, supra, that the precise speed appropriate should be left to local school boards under the supervision of the lower courts, or by deciding that the Fifth Circuit and the District Court have clearly abused their discretion in this case. We respectfully submit that this Court should not be prepared to take either of those steps. If the principles of the second *Brown* case were valid in 1955 and 1958, they are valid today.

In *Watson* v. *City of Memphis*, 373 U.S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963), this Court held that public parks and golf courses in Memphis had to be opened

to persons of all races without delay. In the course of the opinion note was taken of the passage of time since *Brown* v. *Board of Education of Topeka,* supra. This was in the context of a holding that there was no need to apply the principles of the second *Brown* case to such matters as golf courses. The Court said, quite correctly, that all that needed to be done was open them up. To have held otherwise would have been to accept the argument made by the City that delay was necessary because of the threat of riots. This would have been to retreat from *Cooper* v. *Aaron,* supra, and indeed from a government of law. But Atlanta does not ask that, nor for the indefinite delay that the Court said in *Watson* could not be countenanced. We have a school system with well over one hundred thousand pupils in it that must be converted from a dual to a unitary system. We ask only that we be allowed to do this in systematic fashion.

This Court has several times declined to get into the business of deciding, for each city, how fast is fast enough. When *Aaron* v. *Cooper,* 243 F. 2d 361 (C.A. 8th, 1957), was in the Eighth Circuit a major question to be decided related to the speed of desegregation. When the case appeared here as *Cooper* v. *Aaron,* supra, that feature of the case was left undisturbed.

Kelley v. *Board of Education of City of Nashville,* 270 F. 2d 209 (C.A. 6th, 1959), involved approval by the Sixth Circuit of a twelve-year desegregation plan for Nashville, Tennessee. The principal issue in the case was whether this speed was too deliberate and the opinion dealt with the question at considerable length. It was finally concluded that it was a matter for the discretion of the trial judge. A petition for certiorari was

denied. 361 U.S. 924. The Chief Justice and Mr. Justices Douglas and Brennan were of the opinion that the writ should be granted, not on the question whether desegregation in Nashville should take six, eight, ten or twelve years, but limited to a consideration of the validity of a transfer provision. No member felt that this Court should take over the discretionary function of establishing the exact amount of permissible time for each city affected by the *Brown* cases.

Petitioners point out that there are cases in which either the District Court or the Court of Appeals has required a speed-up in the desegregation plan of a school board, though there is no case in which this Court has done so. In *Evans* v. *Ennis*, 281 F. 2d 385 (C.A. 3d, 1960), it was held that twelve years was too long for the desegregation of the Delaware schools. In that case the State School Board relied on *Kelley* v. *Board of Education of City of Nashville*, discussed above. The Court distinguished that case, however, on the ground that the problem was a much greater one in Nashville than in Delaware. The latter State had some 6,813 Negro school children, whereas Nashville had many more. (Atlanta has approximately 45,000.) The Court observed that in the first year of operation of the Delaware plan only 2.5% of the Negro children "available for desegregation" actually applied for admission to formerly all white schools. The Court then applied this percentage to the total number of Negro school children in the State and derived the number 170, representing the number of Negro children who would need to be assimilated into formerly all white schools if all twelve grades were desegregated at once. The problem is of a somewhat greater magnitude in Atlanta even as things

stood prior to the decision of the Court below in this case (and we are not referring to hostility to desegregation). We anticipate that it will be a great deal greater next fall. There are over 14,000 Negro children in the Atlanta high schools alone, and every one will be entitled to attend the school nearest his home, as was explained above. We do not know how many Negro children will need to be assimilated into formerly white schools, but our administrative problem is somewhat greater than Delaware's.

In *Jackson* v. *School Board of City of Lynchburg, Virginia,* 321 F. 2d 230 (C.A. 4th, 1963), it was held that a twelve-year desegregation plan was too slow for that city. That decision was made, of course, by the Court of Appeals and not this Court. Even then the matter was referred back to the District Court to determine how much faster the city could move. And in *Goss* v. *Board of Education,* 301 F. 2d 164 (C.A. 6th, 1962), a speed-up for Knoxville was ordered by the Court of Appeals. All these cases stand for is that the Courts to which the duty of supervision was delegated by the second *Brown* case thought that in the particular cases before them a little more, or a great deal more, speed could be generated.

There is not thereby created a conflict among the Circuits. Petitioners themselves pointed out that the Fifth Circuit too has urged haste at times. It did so in *Bosun* v. *Rippy,* 285 F. 2d 43 (C.A. 5th, 1960), and in *Davis* v. *Board of School Commissioners of Mobile County, Alabama,* 318 F. 2d 63 (C.A. 5th, 1963). The Fifth Circuit has, however, understood its duty to call for equitable flexibility while requiring as much speed toward the ultimate goal as practicable.

Thus, in the *Mobile* case in 1963 the Court remarked rather sharply upon the fact that "the amount of time available for the transition from segregated to desegregated schools becomes more sharply limited with the passage of the years since the first and second *Brown* decisions." 318 F. 2d at 64. On the same day it prescribed a twelve-year plan in *Stell* v. *Savannah-Chatham County Board of Education*, 318 F. 2d 425 (C.A. 5th, 1963).

It is clear, then, that the exact amount of time for the transition to desegregation may vary from city to city, and the determination of this question should be and has been left to the lower federal courts.

2. The Plan Will Achieve Total Desegregation.

Petitioners regard as "more invidious" than the time question just discussed the alleged fact that a denial of rights will persist after twelve years have elapsed. That is not true. Whatever the results might have been under the plan as originally adopted, it has been gradually modified, voluntarily, by the respondents in the direction of more effective desegregation. Any defects that may have existed just prior to the decision of the Court below would appear to be gone, as we explained earlier in this brief.

In the New Orleans case, *Bush* v. *Orleans Parish School Board*, 308 F. 2d 491 (C.A. 5th, 1962), an order was issued requiring the abolition of a dual system of school zones. The same result was reached in *Augustus* v. *Board of Public Instruction of Escambia County, Florida*, 306 F. 2d 862 (C.A. 5th, 1962). In both of those cases, however, it was found that the desegregation plan was being used for the purpose of perpetuating segre-

gation. That is not the case with the Atlanta plan. In *Bush*, particularly, the trial court had pointed out that it did no good to apply a transfer plan without discrimination when all the applicants for transfer would be Negroes. But the Court was speaking in the context of an elaborate transfer system, with numerous vague and discretionary criteria that were subject to abuse. In Atlanta there is only one test, proximity to the school. (Except that if a child of any race wants to attend a school that is not near he will be required to justify it.)

Even if present assignments are kept, subject to transfer under the principles now required of the Atlanta Board and accepted by them, there will not be, in Atlanta, the vice inherent in the system condemned in *Bush* v. *Orleans Parish School Board,* supra. Atlanta will not be maintaining a dual system, for the desegregated grades. Any child may attend the school nearest his home merely by saying that it is his desire to do so. This cannot be called "discriminatory application" of the plan. The petitioners accepted an initial reassignment of all pupils back to their schools. (R. 31 et seq.) Assuming that feature of the plan is retained it is no more than good administration. It would not have the purpose, and could not have the effect, of preserving segregation.

As explained earlier, Atlanta has traditionally not had a rigid system of zones. They are not considered suitable, or educationally best, for the City. School zones are not necessary to the purpose of achieving desegregation.

3. The Courts Below Postponed the Question of Assignment of Teachers and

Other Staff. This Was a Proper Exercise of Discretion.

This case started on its way to this Court with the plaintiffs' application for further relief. It purports to be an attack upon the respondents' *application* of the desegregation plan. (See the Petition for Certiorari, *passim*, particularly Page 14.)

That plan, as approved by the District Court (as its prototype had been approved in the *Shuttlesworth* case, supra, by this Court) had been put into effect upon the motion of these petitioners. It contained no provision concerning assignment of teachers. This case cannot really be an attack upon the application of this plan.

Petitioners prosecute this action as a class action. Indeed, as petitioners observe (Petition for Certiorari, P. 11), the Fifth Circuit ruled in *Potts* v. *Flax*, 313 F. 2d 284 (C.A. 5th, 1963), a suit to desegregate the schools is a class action, whether the parties would have it such or no. The class these petitioners represent is described by them in paragraphs 3 and 4 of the complaint. (R. 3). They do not purport to represent Negro teachers or staff members.

Petitioners contend, however, that desegregated education for children requires that some action be taken regarding faculty and staff at this time. This Court has never so held. Prior to the first *Brown* decision it was customary in those school systems that were segregated to have segregated faculties. The Court in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), based its rejection of the "separate but equal" doctrine of *Plessy* v. *Ferguson* upon the psychological impact upon Negro children of being

treated in a way that implied inferiority. The Court said nothing about the assignment of teachers. There is no hint in the record that anyone regards the Negro teachers in Atlanta as inferior to anyone, or that Negro children are affected in any ascertainable way by the assignments of teachers.

When the Court framed the implementation decree in *Brown* v. *Board of Education of Topeka,* 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), it said nothing about the assignment of teachers.

Withal that, it may be that the Court would one day say something about assignment of teachers. The Fifth Circuit has steadily taken the position, as the District Judge did in this case, that the question of teacher segregation could be postponed because it would automatically be cured with the accomplishment of pupil desegregation. See *Augustus* v. *Board of Public Instruction of Escambia County, Florida,* 306 F. 2d 862 (C.A. 5th, 1962). This position is necessarily correct. When there no longer remains a segregated system there will be no Negro and white schools to which to assign teachers of the same race.

Up to now the lower federal courts have considered, in the main, that they were involved enough in the operation of schools dealing with pupil assignments. This Court has permitted them to hold that when they had a self-righting problem like teacher segregation they could give it the little time needed for the purpose.

Besides, the record shows some beginning on this matter by Atlanta on a voluntary basis. Negro "personnel" teachers work with white pupils as well as Negro. (R. 108). Negro and white teachers attend in-service

training courses on an integregated basis, sometimes taught by Negro "resource personnel," sometimes white. (R. 108).

THERE IS NO NEED FOR THIS COURT TO GRANT THE PETITION FOR WRIT OF CERTIORARI

The Court of Appeals for the Fifth Circuit has faithfully implemented the law as declared by this Court relating to desegregation. It has done so in this case.

This Court has recognized, in both of the *Brown* cases, in *Cooper* v. *Aaron,* and in all the other cases since, that a flexible approach is necessary to the problem of desegregation. It has delegated a broad discretion to the lower federal courts, while instructing them to require good faith and progress toward the goal on the part of local authorities.

There has been steady adherence to this wise policy. Certain momentous questions of constitutional principle have been brought up and decided. Local opposition and disagreement with *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), may not be allowed to defeat the requirements of the Constitution. *Cooper* v. *Aaron,* 358 U.S. 1, 78 S. Ct. 1401, 3 L. Ed. 2d 19 (1958). A pupil placement plan may be used for the assignment or transfer of school pupils, so long as it be not used to perpetuate segregation rather than to accomplish desegregation or simply to manage the schools. *Shuttlesworth* v. *Birmingham Board of Education,* 358 U.S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145 (1958). Such a plan may have a variety of criteria governing assignments, but may not

have criteria based upon race, or which have the inevitable result of perpetuating segregation, such as the minority transfer provision invalidated in *Goss* v. *Board of Education of the City of Knoxville*, 373 U.S. 683, 10 L. Ed. 2d 632, 83 S. Ct. 1405 (1963). The unconstitutionality of segregated public education is no longer an open question; lower federal courts are bound by the decision in *Brown* and must require local school boards to submit a plan and proceed to the business of desegregation. *Davis* v. *Board of School Commissioners of Mobile County*, 84 S. Ct. 10 (1963), refusing to stay a mandate of the Court of Appeals for the Fifth Circuit requiring Mobile, Alabama, to begin desegregation.

Aside from these cases, this Court has left the implementation of the *Brown* principles to the lower courts. In particular, the Court has not even considered the question whether desegregating from the top down, or from the bottom up, is preferable, or whether any given number of years is the right or the wrong speed. Those questions are not matters of constitutional principle, but of equitable flexibility and the discretion of courts closer to the scene, as well as of the existence or not of good faith on the part of the local authorities.

The Court of Appeals for the Fifth Circuit has not been behindhand in carrying out its duty. For example, the minority transfer provision invalidated by this Court in *Goss* came up from the Sixth Circuit, where it had been approved in *Goss* v. *Board of Education*, 301 F. 2d 164 (C.A. 6th, 1962), and *Kelley* v. *Board of Education of City of Nashville*, 270 F. 2d 209 (C.A. 6th, 1959), cert. den. 361 U.S. 924. In the Fifth Circuit it was already invalid for the reason subsequently assigned by

this Court in *Goss*, that is, that it tended to perpetuate segregation, and it had been so held in *Bosun* v. *Rippy*, 285 F. 2d 43 (C.A. 5th, 1960).

Petitioners object, in this case, to the fact that the Court of Appeals did not order a speed-up of the Atlanta plan, which is a grade-a-year plan applicable this year to grades 8 through 12. It is clear, however, that the Court is acutely aware of the passage of time and did not decline to order a speed-up out of reluctance to enforce the principles of *Brown*. On the contrary, in *Bosun* v. *Rippy*, supra, the Court said (anticipating the remarks of this Court in *Watson*):

> "In so directing, we do not mean to approve the twelve-year, stair-step plan 'insofar as it postpones full integration.' See Evans v. Ennis, 3 Cir., 1960, 281 F. 2d 385, 389. The district court has not expressly passed on whether the speed is too deliberate. It retains jurisdiction of the action during the transition." 285 F. 2d at p. 47.

The Fifth Circuit Court of Appeals threatened, in *Davis* v. *Board of School Commissioners of Mobile County, Alabama*, 318 F. 2d 63 (C.A. 5th, 1963), to displace the discretion of the district judge if he showed himself tardy in requiring desegregation. And once again the Court took note of the passage of time since *Brown*. It is crystal clear, then, that the Fifth Circuit Court is not shirking its duty, nor is it recalcitrant, in the matter of desegregation, without being prompted by this Court. On the other hand, it continues to recognize the validity of the second *Brown* decision that these matters should be left in local hands, to the fullest extent possible, and

that equitable flexibility must be exercised by the lower courts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

HENRY BOWDEN
C. & S. Bank Building
Atlanta, Ga. 30303

A. C. LATIMER
1405 Healey Building
Atlanta, Ga. 30303

APPENDIX

ATLANTA PUBLIC SCHOOLS
Administration Building
224 Central Avenue, S.W.
Atlanta 3, Georgia

Administrative Offices

December 6, 1963

Mr. A. C. Latimer
1203 Healey Building
Atlanta, Georgia

Dear Mr. Latimer:

In response to your request for further information I am supplying answers to specific questions as follows:

1. Upon what basis and authorization were Negro transfers allowed in 1963?

   In June, 86 Negro pupils were authorized transfer on the basis of probability of succeeding academically and upon their proximity to the school requested. However, in August, 1963, the factor or criterion of "probability of academic success" was removed and all students desiring to continue their application were transferred provided they lived closer to the predominantly white school requested. This new position was approved by the Board of Education on August 20, upon the recommendation of the Superintendent.

2. What were some comparisons in terms of number of transfers requested, number of transfers approved, and percentage of transfers approved in 1961, 1962, and 1963?

	1961	*1962*	*1963*
Number returning applications	135	263	191
Number authorized to transfer	10	40	119
Percentage	07%	15%	62%

3. Of the number applying for transfer in 1961, 1962, and 1963, how many were denied admission who, in fact, lived closer to the white schools requested than to the Negro schools in which they were currently enrolled?

	1961	*1962*	*1963*
Number applying	135	263	191
Number approved	10	40	119
Lived closer to present school	90	72	29
Lived closer to "white" school	35	151	43
Number denied living closer to "white" school	25	111	0*

* None denied who wished their application continued.

4. Are there instances or examples in which the Atlanta school system liberalized the Pupil Placement Plan or exceeded the tempo of desegregation prescribed by the plan, or otherwise demonstrated good faith in going beyond the minimum limits of the placement plan, in desegregation of the schools?

(a) At the outset only 3 of the 18 criteria were used because only 3 appeared to be practical and meaningful. In 1962, the only factors judged were "probability of academic success" and "proximity to the schools requested." In 1963, no factor was used except that of "proximity to the school requested."

(b) Students moving into the city requesting transfers to white schools on dates other than that specified by the pupil placement plan were allowed to enroll in predominantly white schools. (Example: Paula Sherwood moved here from New York and requested to enter West Fulton and the request was granted.)

White students requesting transfer to Negro schools were approved (Example: Charles Jerome Coleman to Washington.)

(c) Occasionally students are allowed to accelerate from the 7th to the 9th grade when these students are exceptionally brilliant. (Example: Michael Fears, a Negro student, was allowed to skip the 8th and move directly from the 7th to the 9th grade at predominantly white Fulton High School.)

(d) About 14 students were enrolled at Smith-Hughes, previously all white, last February without having to file application as prescribed in the Pupil Placement Plan.

(e) In the fall of 1963 all Negro applicants, qualifying for admission on the same basis as white, were admitted to Smith-Hughes Vocational School. The number enrolling is 334 adult students.

I hope this information is what you requested.

Sincerely yours,

RUAL W. STEPHENS
Deputy Superintendent

RWS:ejh